11 March 1975

MEMORANDUM FOR: General Counsel

SUBJECT : Authority of Congress to Release Classified Data

1. I have found no express authority for Congress to publicly release information classified by the executive branch pursuant to an Executive order issued by the President. Moreover, on a number of occasions Congress has mandated that matters pertaining to national defense or foreign policy be kept secret.

--Congress has made it a crime for one lawfully having possession, access or control of documents relating to national defense or information relating to the national defense which the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation to communicate, deliver, or transmit same to any person not entitled to receive it. 18 U.S.C.A. 793(d).

--Congress has made it a crime to disclose to an unauthorized person or publish any classified information obtained by the processes of communications intelligence. 18 U.S.C.A. 798(a).

--Congress has made it a crime to photograph or sketch vital military or naval installations or equipment requiring protection against general dissemination of information. 18 U.S.C.A. 795. It is also a crime to publish or disseminate photographs, maps, or drawings of such defense installations without first obtaining permission of the commanding officer or higher authority. 18 U.S.C.A. 797.

--Congress, in order to prevent public disclosure of certain activities, has given various officials the power to keep confidential certain funds expended for national security or foreign relations purposes. Such authority is given, for example, to the President (22 U.S.C.A. 2364), to the Secretary of State (31 U.S.C.A. 107), and to the Director of Central Intelligence (50 U.S.C.A. 403j).

--Congress has provided that meetings of the Senate Committee on the Budget may be closed to the public if it is determined by a record vote of a majority of the members that the matter to be discussed

> ...will disclose matters necessary to be kept secret in the interest of national defense or the confidential conduct of the foreign relations of the United States. 2 U.S.C.A. 190a-3.

--Congress, after requiring that the Secretary of State transmit forthwith to the Congress the text of any international agreement, other than a treaty, to which the United States is a party, goes on to provide that

> ...any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President. 1 U.S.C.A. 112b.

--Finally, Congress, in enacting the Freedom of Information Act, expressly exempted from disclosure matters which are

> ...specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy. 5 U.S.C.A. 552(b)(1).

2. Despite this apparent lack of authority to release classified data and the existence of the above-mentioned statutes, Congress is constitutionally immunized, at least in part, against any consequences flowing from release and disclosure of classified information. Article I, § 6 of the Constitution states in respect to Senators and Representatives that:

> ...for any Speech or Debate in either House, they shall not be questioned in any other Place.

3. A long line of Supreme Court cases, beginning with Kilbourn v. Thompson, 103 U.S. 168 (1991), has held that the privilege or immunity relating to speech or debate should be given a broad and liberal construction. In Kilbourn the court stated:

> It would be a narrow view of the Constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting.... In short, to things generally done in a session of the House by one of its members in relation to the business before it. (At p. 204.)

4. The court, moreover, has resisted arguments that an unworthy purpose should destroy the privilege. In Tenney v. Brandhove, 341 U.S. 367 the court reaffirmed its earlier holding in Fletcher v. Peck, 6 Cranch 87 (1810), stating:

> ...that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. (At p. 377.)

The distance to which the court was willing to go to uphold this principle was seen in United States v. Johnson, 383 U.S. 169 (1966). In that case a former Congressman was convicted for conspiracy to defraud the U.S., in part on evidence that, in pursuance of a conspiracy designed to give assistance to certain savings and loan associations which had been indicted on mail fraud charges, he was paid to give a speech on the floor of the House. The Supreme Court granted a new trial holding that a prosecution which draws in question the legislative acts of the defendant member of Congress or his motives for performing them "necessarily contravenes the Speech or Debate Clause." (At p. 185.)

5. The court addressed the issue of classified information in Gravel v. United States, 408 U.S. 606 (1972), a case which arose when Senator Gravel, Chairman of the Subcommittee on Buildings and Grounds of the Senate Public Works Committee, convened a night meeting of the Subcommittee and there read extensively from a copy of the Pentagon Papers which bore a Defense security classification of Top Secret - Sensitive. He then placed the entire 47 volumes of the study in the public record. Senator Gravel claimed that Article I, section 6 protected him from criminal or civil liability and from

questioning elsewhere than in the Senate, with respect to the events occurring at the Subcommittee hearing at which the Pentagon Papers were introduced into the public record. The court stated: ".../T/o us this claim is incontrovertible." (At p. 615.)

6. The court further noted that:

> The Speech or Debate Clause was designated to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process. We have no doubt that Senator Gravel may not be made to answer--either in terms of questions or in terms of defending himself from prosecution--for the events that occurred at the subcommittee meeting. (At p. 616.)

7. From the above, together with the positive phrasing of Article 1, § 6 of the Constitution, it would appear that any Member may make any statement he desires on the floor of the Congress or in one of its committees. Such statement shall be absolutely privileged, notwithstanding that it was based on information secured from classified Central Intelligence Agency material either furnished the Member in confidence or containing any restrictive notice as to use or dissemination. This privilege would operate if the Member were to read the information verbatim into the record on the floor or into the record of hearings before a congressional committee. It would still be privileged when it appeared, verbatim, in the Congressional Record or in the published hearings of a congressional committee. The only sanction, apart from the individual conscience and sense of responsibility of the Member, would have to come from Congress itself, which has the power to discipline any Representative or Senator who improperly disclosed classified information.

8. One additional wrinkle might be noted. Although Congressmen would be immune from liability for introducing classified information into a committee report and immune from liability for ordering it printed and disseminated to the public at large, the Public Printer and the Superintendent of Documents may not be immune from suit for printing and disseminating such reports to the public. The court examined this question in Doe v. McMillan, 412 U.S. 306(1973), a case in which petitioners claimed that a report issued by the House Committee on the District of Columbia, containing

documents relating to disciplinary problems of certain specifically named students, violated statutory, constitutional and common-law rights to privacy. The Supreme Court refused to determine whether dissemination to the public would serve the important legislative function of informing the public concerning matters pending before Congress for the purpose of holding Members of Congress liable. However, it remanded the case to the Court of Appeals, in part to undertake just such a review in order to determine whether the Public Printer and the Superintendent of Documents, who were without blanket immunity, could be held liable.

9. The discussion thus far has dealt only with congressional immunity for releasing classified information in Congress. No such immunity exists in the case of disclosures made by congressmen outside of Congress. Thus, in Long v. Ansel, 69 F.2d 386 (Ct. App., D.C. 1934), affd. 293 U.S. 76 (1934), and in McGovern v. Martz, 182 F. Supp. 343 (US Dist. Ct., D.C. 1960) it was held that if a Senator or Representative is alleged to have committed libel by republishing and disseminating remarks made in the Congress, such republication and dissemination is not within the Speech or Debate privilege even if such privilege would have been applicable to the original publication of the remarks. Again, in Gravel v. United States, 408 U.S. 606 (1972), and in Doe v. McMillan, 412 U.S. 306 (1973) the court noted that the Speech or Debate Clause does not protect "a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process."

10. From the above it is apparent that a Member is not privileged to circulate CIA documents to his constituents, to the press, or by reading to a meeting or on radio or television. Such action could well make the member liable for prosecution under the espionage laws, but in any event would expose him to the same liability for these actions as any other citizen. As a practical matter, however, the prosecution of a Member for unauthorized disclosure of classified CIA material, or disciplinary action by Congress itself, is very unlikely.

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